United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

76-1576

United States Court of Appeals

For the Second Circuit

B P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES F. HEIMERLE and
RICHARD G. WARME,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

BRIEF ON BEHALF OF DEFENDANT-APPELLANT JAMES F. HEIMERLE

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BRIEF ON BEHALF OF DEFENDANT-APPELLANT

JAMES F. HEIMERLE

Preliminary Statement

Defendant JAMES HEIMERLE was indicted in a four-count indictment along with RICHARD G. WARME, BERNARD HOROWITZ and JOSEPH PETERS, and charged with, count 1, conspiracy (18 U.S.C. §371) to violate 18 U.S.C. 473 (wilfully dealing in counterfeit) between November 1, 1975 and February 29, 1976. In addition, Heimerle and Warme were charged with three substantive counts of dealing in counterfeit, 18 U.S.C. 472, 473; two counts in December 1975 and one count in January 1976. After a five day jury trial before Judge Milton Pollack in the Southern District of New York, the two defendants were found guilty on the conspiracy count. The jury disagreed on the three substantive

counts and a mistrial was declared as to those counts (693).[1] They were later dismissed by the court on motion of the Assistant United States Attorney (738, A-393).

Shortly prior to trial which commenced September 28, 1976, and on September 21, 1976, the government filed a notice charging defendant Heimerle with being a dangerous special offender pursuant to 18 U.S.C. §3575(a).

Judge Pollack found Heimerle to be a "dangerous special offender" and sentenced him to ten years, which sentence was to follow consecutively after a seven year sentence he had just commenced serving on another counterfeit conviction. He was also sentenced to pay a $10,000 fine (738). If Heimerle had not been adjudged a "dangerous special offender," the maximum term he could have been given under the statute would have been five years in prison.

Questions Presented

(1) Did the court below err when it permitted, over objection, the confession of co-defendant Warme to be admitted in evidence which, even though redacted, suggested the complicity of defendant Heimerle and

a) A witness (Peters) testified in a manner which indicated that Heimerle, himself, had confessed;

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1. References to the pages in the trial transcript will be made by the page number in parentheses; to the Defendants' Joint Appendix by A- and page number in parentheses.

b) The court commented on the redaction of the Warme confession and told the jury that the confession had, in fact, read differently;

c) The prosecutor told the jury, in effect, in summation and over objection that the confession was proof of the guilt of both defendants?

(2) Did the court below err in admitting in evidence prior convictions of defendant on the prosecution's direct case where the only purpose, in fact, was to show propensity to commit crime

a) particularly where one conviction was later nullified on collateral appeal and

b) another conviction covered the same time period and double jeopardy considerations required a single prosecution?

(3) Was not the error of permitting the jury to know about defendant's prior convictions compounded by the eliciting on direct examination by the prosecutor of the fact that a witness (Peters) had met defendant Heimerle in prison?

(4) In this case did not the application of the dangerous special offender law (18 U.S.C.§3575) unduly prejudice the defendant and deprive him of due process of law?

The Trial

The bulk of the evidence against Heimerle was based on the testimony of Bernard Horowitz and Joseph Peters, indicted co-conspirators who had pleaded guilty to the conspiracy charge prior to the commencement of the trial.

Horowitz identified Heimerle and Warme as persons he knew (18). He had been introduced to Heimerle at a bar on Broadway called "Carruthers" by Joseph Peters in November of 1975 (18, 85, A-207). They immediately commenced a conversation discussing counterfeit; Heimerle asked Horowitz whether he had "ever run across any counterfeit." Heimerle, according to Horowitz, said he was about to have a great deal of counterfeit in his possession and that he could sell it (24). Horowitz told Heimerle that he thought the quality of the bills was poor because they were yellowish (25). Horowitz promised to contact certain people for Heimerle in connection with selling the bills (26). Horowitz then contacted co-defendant Richard Warme and made an appointment to meet him along with Heimerle and Peters at the Cross County diner in Yonkers (27, 28). Over objection Horowitz testified that Heimerle and Peters brought counterfeit with them that "had been given as a present by certain people for keeping his mouth shut on a previous crime" (28, 29). The counterfeit was in hundred dollar bills (29). Outside the diner there was a conversation in which Heimerle and Peters agreed to sell a certain amount of money to Warme (30). Later

Horowitz saw them go into a garage in Dobbs Ferry (30). At the garage, Horowitz saw Heimerle take a certain amount of counterfeit out of the back of his car and bring it into the garage (31). Horowitz testified that the deal was "consummated" there and Heimerle promised Horowitz that he would "take care" of him "at some future date" (32). Later there was another conversation about counterfeit with Heimerle (36), and there came a time again when Heimerle offered him hundred dollar bills (36). Horowitz wanted twenties and fifties (37). Later Peters brought Horowitz hundreds, twenties and fifties that he said he had gotten from Heimerle, which he wanted to sell for twelve dollars a hundred (37, 38).

In the early part of December 1975 Horowitz said Peters and Warme had another conversation concerning counterfeit obtained from Heimerle (39). Peters and Warme came with $50,000 counterfeit and planned to send Horowitz to Las Vegas "to get rid of quite a sum of counterfeit money there" (39-40). Later Horowitz went with Peters and Warme to Kennedy airport and obtained a ticket and boarded an airplane for Las Vegas, Nevada (40-42, 57, A-178). All Horowitz took to Las Vegas was a small bag packed with $50,000 in counterfeit bills obtained from Warme (55, 56, Ex. 2). In Las Vegas, Horowitz checked into Caesar's Palace and gave the bag with the counterfeit to the bell captain (58, A-179). Later someone burglarized his room and made off with counterfeit samples and his (Horowitz's)

plane ticket back to New York (60, A-181). Horowitz then returned to New York with the bulk of the counterfeit which he returned to Peters and Warme (60, 61, A-181, A-182). Cf. Peters' testimony (344-347). Before Horowitz left for Las Vegas, Warme and Peters doctored up the counterfeit with a steam iron and spray starch (62, A-183).

On December 10, 1975, Horowitz was with Warme who suggested that, in view of Horowitz's need for cash, he go into a Gimbels Department store located in the vicinity of Cross County and buy a heating pad with a counterfeit hundred dollar bill (64, 65, A-185, 186, Ex. 1). Horowitz was not successful because the sales lady called a security guard (65, A-186). All the counterfeit bills had the same serial number (68, A-189). The counterfeit hundred dollar bills were easily recognizable as counterfeit and had a yellowish tinge (72, A-194). Cf. Peters testimony (341-343).

There did come a time, later, when Heimerle showed Horowitz a new batch of counterfeit, twenties, fifties and hundreds, at a time when Peters was present (73, 74, A-195, 196).

Horowitz admitted to having been convicted of six prior felonies in addition to his plea of guilty to conspiracy in the instant case (75, 76, A-197, 198). Moreover, he referred to a "confession" as the reason why he agreed to cooperate and the reference he made to the "confession" suggested that Heimerle instead of Warme had confessed (136, A-239).

Over objection, Horowitz testified that Heimerle had

told him that he met Joe Peters in Greenhaven prison. This answer prompted Heimerle's counsel to request a mistrial which was denied (78, 79, A-200, 201). The other witness who connected Heimerle to the illegal counterfeit transaction was Joseph Peters who had also pleaded guilty to the conspiracy count of the indictment (312). Peters admitted to four prior felony convictions and to having spent 33 years of his 56 years in "correctional" institutions (366).

In late November of 1975, Peters was contacted by Heimerle concerning counterfeit one hundred dollar bills that were bad -- yellow. Peters could not remember what Heimerle said at their meeting (316). Over objection, Peters was permitted to say that he had originally met Heimerle in Green Acres prison (317). Heimerle's attorney again asked for a mistrial which was denied (317). Peters could not remember his conversation with Heimerle about the counterfeit and the court permitted the prosecutor to refresh his recollection from his (Peters') grand jury testimony (318-320, A-240). In the course of refreshing his memory he admitted a conversation with Heimerle concerning counterfeit. Following this Peters blurted out:

> "It was--I believe that this whole trial is pretty puch [sic]--this man gave a confession" (321, A-241).

Both counsel moved for a mistrial which was denied. The court gave an admonishing instruction as it had in the two

instances where witnesses had testified that Peters met Heimerle in prison (317, 322, A-242).

Peters testified that Heimerle told him he wanted to sell the counterfeit hundred dollar bills (242, 322). There came a time when Peters went to a garage in the Bronx with Horowitz and Warme to meet Heimerle (324, 325, A-244, 245). They met outside a diner in the vicinity of Cross County (325). Heimerle offered to sell the counterfeit to Warme (326) -- the same yellow hundred dollar bills described earlier (327). Warme gave Heimerle genuine currency for the counterfeit.

Peters was frequently unable to answer any questions about what had transpired (328, 330, 331). At one time Horowitz in the company of Heimerle introduced Peters to a person called "Fat Joey" in order to sell him Heimerle's yellow hundred dollar bills (332), and a sale took place (333).

At Christmas time 1975, Peters spoke to Heimerle again about a new batch of counterfeit of hundreds, fifties and twenties (334). This occurred when Peters went with Heimerle to Warme's house and there was a discussion about paying for it (335). Warme gave Heimerle $4,000 for the counterfeit which was supposed to bring $12,000 (336-338).

At some point later, Peters, Heimerle and Warme met again at a diner at Dobbs Ferry in Irvington, at which time Warme promised to pay Heimerle money (340). On that occasion they were stopped by a police officer who checked out Heimerle's license (418).

Peters also reported conversations with Heimerle concerning a printing plant operated by Heimerle where the counterfeit was printed (349-352, A-247-249).

Other witnesses testified to the connection of the other co-conspirators to one another: Robert Olivieri (190-227), Fred Glock (228-239), Lawrence Miressi (249-310), James Neal (421-425), Samuel Zona (426-455), John Vezeris (457-503); but these witnesses did not mention Heimerle. Police Officer Raymond Malera testified that on January 4, 1976, he went to the Mayflower diner in Dobbs Ferry where he saw three white males conversing (416). They later separated and he followed one car towards Ardsley. He stopped that car and noted that James Heimerle was the driver and that Joseph Peters was a passenger (418).

Before it rested, the government offered in evidence three prior convictions of Heimerle as part of its direct case on the grounds that Rule 405(b) of the Federal Rules of Evidence permitted this evidence to show "character trait, intent, knowledge (442, A-261).

The government also offered in evidence a confession of co-defendant Warme from which was redacted specific references to Heimerle. It nonetheless corroborated testimony concerning meetings and was clearly a changed confession (450-455, A-267-271). The grammar was clumsy and it was apparent that references to Heimerle were omitted (Ex.10-12, A-405-410). In fact, the court

instructed the jury that certain references in the confession were changed, but that they were not to be concerned with that issue (660, 661, A-333, 334).

After the finding by the jury of guilty of the two defendants (Heimerle and Warme) on the first count of the indictment (conspiracy), the court proceeded to determine whether or not Heimerle should be treated as a special dangerous offender under 18 U.S.C. §3575 (701, A-356) based on a notice filed by the government on September 21, 1976 -- seven days before the commencement of the trial (707, A-362, Court's Ex. 1). Pursuant to the proceedings then had, certified copies of two state court convictions of felonies (710-711, A-365, 366) and three federal felony convictions were admitted in evidence (712-714, A-367,368).[2]

Although it was not admitted in evidence, the government asked the court to consider the contents of a probation report concerning Heimerle and particularly a finding "Prognosis is poor." Heimerle's lawyer objected to the exhibit; it was not offered in evidence and is not before this Court; the court below, however, stated that it would be considered under 18 U.S.C. §3575 (717, A-372). In addition, the trial court stated it was considering a further two page memorandum from the Chief Probation Officer -- a chronological statement of the judgments

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2. One of the convictions considered by the court, 72 Cr. 1330, was set aside by Judge Carter after the court found the defendant Heimerle to be a dangerous special offender (A-427).

offered in evidence (717, A-372).

The government and the defense then rested (718, A-373).

Defense counsel argued inter alia that it was improper for the court to consider the prior conviction for a violation of the federal counterfeiting law before Judge Metzner because the conviction was based on facts and events which paralleled the conviction in the instant case in terms of time-frame (727, A-382).

The court considered that it had held a hearing on this issue and found that in fact Heimerle was a dangerous special offender in that he has a "propensity toward criminal activity" (736, A-391).

In addition to a $10,000 fine, Heimerle was sentenced to ten years in the penitentiary to commence at the conclusion of a seven year sentence imposed by Judge Metzner (738, A-393).

ARGUMENT

POINT I

THE COURT BELOW ERRONEOUSLY PERMITTED IN EVIDENCE A REDACTED VERSION OF CO-DEFENDANT WARME'S CONFESSION WHICH, COUPLED WITH OTHER TESTIMONY AND THE GOVERNMENT'S SUMMATION, PLACED CHARGES AGAINST THE DEFENDANT IN A PREJUDICIAL SETTING AND DENIED HIM THE RIGHT OF CROSS-EXAMINATION.

A purported confession of co-defendant Richard Warme was read into evidence and physically introduced as an exhibit for the perusal of the jury. The confession, itself, was unsigned. Because in the original unsigned confession Heimerle was mentioned as "Jimmy" five times on the second page of the unsigned confession, the court edited the confession to omit all the references to "Jimmy."

In so doing, the court permitted the second page to be retyped in a different and much-larger-print type. One omission of "Jimmy's" name was done to indicate there were two or more persons involved.

The unredacted version read:

> "Joe and Jimmy were going to sell me this package for $140 in genuine money for each $1000 in counterfeit." (A-409)

The redacted version read:

> "Joe were going to sell me this package for $140 in genuine money for each $1000 in counterfeit." (A-406)

Other references to "Jimmy" being present at a meeting

in a diner were redacted. Yet the so-called confession corroborated other testimony that Heimerle had been together with co-conspirators in a diner during the period of the conspiracy (28-30, 340).

Co-conspirator Peters blurted out in a context which could only refer to Heimerle, "this man gave a confession" (321, A-241). Moreover, the prosecutor in his summation specifically told the jury that Warme's confession had implicated everyone which certainly included the only co-defendant, Heimerle:

> "He [Warme] tells us about Peters, Oliveri, the yellow hundred-dollar bills, the new stuff that they were dealing in. He tells us about Fred Glock. He tells us about everybody right there in his own words." (Emphasis supplied) (544, A-292)

and

> "But, ladies and gentlemen, this document verifies by and large the testimony of Horowitz and Peters [the only witnesses who implicated Heimerle in the conspiracy]. It verifies, it talks about dealing with Horowitz and Peters. It talks about the counterfeit from the mouth of the defendant himself." (613)

A timely motion for mistrial was denied; the jury was not given any limiting instructions by the court in this regard (622).

The court commented on charges made in the so-called "confession," referred to the different type on the typewriter, and told the jury to disregard any adverse inferences (632).

It is here submitted that, under all the facts, the judge was instructing the jury to do the impossible. This Court said in United States v. Bozza, 365 F.2d 206, 216 (2 Cir. 1966):

> "Not even appellate judges can be expected to be so naive as really to believe that all twelve jurors succeeded in performing what Judge L. Hand aptly called 'a mental gymnastic which is beyond, not only their powers, but everybody's else.' Nash v. United States, 54 F.2d 1006, 1007 (2 Cir. 1932). It is impossible realistically to suppose that when the twelve good men and women had Jones' confession in the privacy of the jury room, not one yielded to the nigh irresistible temptation to fill in the blanks with the keys Kuhle had provided and ask himself the intelligent question to what extent Jones' statement supported Kuhle's testimony, or that if anyone did yield, his colleagues effectively persuaded him to dismiss the answers from his mind. It well may be that a juror's engaging in this process 'furthers, rather than impedes, the search for truth,' as Judge Hand suggested, 54 F.2d at 1007. So, as some think, would the introduction of many statements banned by the hearsay rule. But the Sixth Amendment guarantees every accused the right 'to be confronted with the witnesses against him,' and it 'cannot seriously be doubted at this late date that the right of cross-examination is included' in the constitutional guarantee. Pointer v. State of Texas, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965)."

Bozza anticipated the United States Supreme Court ruling in Bruton v. United States, 319 U.S. 123 (1968) and places Supreme Court imprimatur on the proposition that court admonitions to juries to disregard improper evidence are not always effective. The Court there quoted Mr. Justice Jackson in Krulewich v. United States, 336 U.S. 440, 453 (1949):

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . ."

See Bond v. Oklahoma, 546 F.2d 1369, 1376, 1377 (10 Cir., 1977).

POINT II

THE COURT BELOW ABUSED ITS DISCRETION IN PERMITTING CERTIFIED COPIES OF TWO PRIOR CONVICTIONS FOR COUNTERFEITING TO BE ADMITTED IN EVIDENCE; THE ONLY PURPOSE SERVED WAS TO SHOW PROPENSITY TO COMMIT THE CRIME CHARGED IN THIS INDICTMENT.

The prosecution offered in evidence certified copies of two prior federal counterfeiting convictions (Ex. 7 and 8, A-399, A-402).[3] The stated purpose was to show intent (442). The real reason, however, as appears from the argument in the prosecutor's summation, was to show propensity and bad character and to establish that Heimerle acted in conformity with the demonstrated-by-prior-conviction bad character. Mr. Naftales argued to the jury:

> "What do we know about Mr. Heimerle, other than the instances that were testified to here about his participation in the scheme? We have in evidence two prior convictions of Mr. Heimerle,

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3. The conviction represented by Exhibit 8 has been set aside on collateral attack since the trial (A-427-429). The conviction represented by Exhibit 7 involves the same time period as the instant case, overlaps the events and because both indictments charge conspiracy there is a double jeopardy issue involved. Heimerle has maintained in motion to this court and in the court below that the indictments should have been consolidated.

> both within the last three years. For what? Dealing in counterfeit money. He was convicted on June 18, 1973, in this court house, for conspiracy to distribute and pass counterfeit and the actual sale of counterfeit currency. And what does the indictment tell us? Fifty-and-one-hundred-dollar Federal Reserve notes, two of the same denominations as in the instant case. What else do we have in evidence? That this very June, June 15th of this year, Mr. Heimerle was also convicted of three counts of selling hundred-dollar Federal Reserve notes, and he was convicted of a conspiracy to be involved in that. Consider that, ladies and gentlemen of the jury. Consider that about Mr. Heimerle, the kind of business enterprise that he establishes. I submit to you, ladies and gentlemen, that we have evidence here before us that he has structured [sic] once again or participated once again in the illegal business enterprise aimed at the sale of counterfeits like he was convicted of twice before." (541, 542, A-290, 291)

Said this Court recently in United States v. Papadakis, 510 F.2d 287, 294 (2 Cir. 1975), cert. den. 421 U.S. 950:

> "This Court has held that evidence of other criminal offenses is admissible if it is relevant for some purpose other than merely to show a defendant's criminal character, provided that its potential for prejudicing the defendant does not outweigh its probative value."

In the case at bar the only reason for the introduction of Heimerle's record was to assure his conviction.

> ". . . The assumption that prior conviction demonstrates a propensity on the part of the defendant to have acted on the present occasion in conformity with the criminal character suggested by the previous conviction is impermissible." United States v. Cohen, 544 F.2d 781, 785 (5 Cir. 1977)

The Eighth Circuit Court of Appeals reversed a criminal conviction which was predicated on evidence of a prior conviction

pointing to the "prejudicial effect of such testimony." United States v. Partyka, 544 F.2d 345 (8 Cir. 1976). Cf. United States v. McMillan, 535 F.2d 1035 (8 Cir. 1976).

The issue posed by the admission of the two prior counterfeiting convictions is discussed at length by Judge Weinstein in his treatise on the New Rules of Evidence (Weinstein's Evidence, 1976, ¶404 [04]). There is, indeed, an exclusionary rule underlying the proposition that introduction of prior convictions in order to impute to defendant a propensity to commit crimes is inadmissible before a jury.

> "The rule is justified primarily on the ground that the probative value of propensity evidence is outweighed by its prejudicial effect on a jury. The introduction of such evidence is said to create a danger that the jury will punish the defendant for offenses other than those charged, or at least that it will convict when unsure of guilt, because it is convinced that the defendant is a bad man deserving of punishment. In addition, it is argued that the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor. At the least, it is said that such evidence would be given greater probative weight than it deserves, and so lead to convictions on insufficient evidence. Furthermore, saddling a person forever with his record might tend to discourage reformation." (Weinstein, quoting 78 Harv. L. Rev. 426, 436 (1964)).

Rule 405 (b) provides that specific instances of conduct are admissible where "character or a trait of character of a person is an essential element of a charge."

Again Weinstein discusses this issue:

> "Proof of character by evidence of specific acts is not permitted where the evidence is to be used

> circumstantially as a basis for inferring that a person acted in conformity with his character." (¶405 [04], 405-39)

The evidence of the co-conspirators in the case at bar, if it were to be believed, was such that it did not require any proof of bad character to prove bad intention. If the co-conspirators' testimony was to be believed, there was no need to throw in prior convictions for counterfeiting offenses. Such evidence went only to propensity and was damaging.

This prejudice was underlined by reason of the fact that one conviction was later set aside as improper (A-427) and the other concerned overlapping incidents with those in the case at bar suggesting issues of double jeopardy. See infra Point IV. Said the court in United States v. Klein, 515 F.2d 751, 756 (3 Cir. 1975):

> ". . . the way in which the prior crime was introduced gave the jury no basis for determining whether a similar method of operation had been employed. Merely reading the prior indictment to the jury, in our view, had no probative value on the issue on which it was admitted. As such we conclude that the admission of the prior crime in this manner was an abuse of discretion."

The court below clearly abused its discretion in permitting the evidence of prior criminal conduct in evidence in this case.

POINT III

THE ERROR OF ADMITTING PRIOR CONVICTIONS TO SHOW PROPENSITY TO COMMIT CRIME WAS COMPOUNDED BY THE PROSECUTOR'S RECKLESS QUESTIONING OF WITNESSES TO ESTABLISH THAT THEY HAD MET DEFENDANT HEIMERLE IN PRISON.

Both Peters and Horowitz -- the only two witnesses testifying against Heimerle who connected him to the crime of conspiracy of which he was convicted -- referred to meeting the defendant in prison (91, 92, 317, A-213, 214). The questions were objected to; the objections were overruled and the damaging evidence came in before the jury. Thereafter certain limited instructions were given by the court (317, 318).

The answers were elicited by the prosecutor in a deliberate attempt to add more prejudice and to obtain a conviction based, not on the evidence before the jury, but on the "bad-man" theory of guilt.

In United States v. Warf, 529 F.2d 1170, 1174 (5 Cir. 1976), the court said:

> ". . . and it cannot be seriously u. ed that the government did not intend the consequences [of its questions]."

Moreover the Warf court held that references to prior incarceration of the defendant were improper. Cf. United States v. Cook, 538 F.2d 1000 (3rd Cir. 1976).

Compounded with the fact the jury knew about prior convictions for the same crime, the fact of prior incarceration

in prison could only have made that jury more sure of defendant Heimerle's propensity to commit crime. Said the court in Court of Virgin Islands v. Toto, 529 F.2d 278, 283 (3 Cir. 1976):

> "When such evidence inadvertently reaches the attention of the jury, it is most difficult, if not impossible, to assume continued integrity of this presumption of innocence. A drop of ink cannot be removed from a glass of milk."

POINT IV

THE ADDITIONAL FIVE YEAR PRISON SENTENCE OF HEIMERLE MUST BE SET ASIDE BECAUSE THE PROCEEDINGS UNDER THE DANGEROUS SPECIAL OFFENDER LAW (18 U.S.C. §§ 3575-77) DEPRIVED THE DEFENDANT OF DUE PROCESS OF LAW.

Prior to trial the government filed a notice that the defendant, Heimerle, was a "dangerous special offender" (A-9). The notice read in pro forma fashion that the defendant was a dangerous special offender because of more than two prior felony convictions within less than five years -- that the felonies were part of a pattern of conduct which was criminal under the applicable laws and from which crimes the defendant obtained "a substantial part of his income," pursuant to 18 U.S.C. §3575(a) and §3575(b).

Thereafter the notice listed two state felony convictions (forgery, grand larceny) (A-10, 11), two federal counterfeiting convictions[4] (A-11, 12) and one federal mail fraud

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4. One of which has since been set aside (A-429); the other included a conspiracy charge which overlapped in time the instant conviction.

conviction (A-11).

It was further alleged that evidence would be offered at the hearing to show that the present offense was part of a pattern of conduct from which the defendant derived "a substantial part" of his income and that evidence would be offered to show that the defendant had knowledge of the location of an illicit printing plant (A-12).

At the hearing which followed the trial, the government abandoned the charges which alleged that the defendant was a professional criminal who derived a substantial part of his income from crime (18 U.S.C. §3575 (e) (2), thus it proceeded only under §3575 (e) (1). The only evidence received at the hearing was a listing of defendant's convictions (706-709) and the listing of certified copies of these convictions (Exhibits 1 through 5, 709).

Defendant contends that this proceeding in its entirety deprived him of due process in several respects:

1) No evidence whatsoever was offered to support the damaging charge and allegations under §3575 (e) (2), or that the defendant was in fact "dangerous," thus not setting forth facts with particularity as required by United States v. Stewart, 531 F.2d 326, 332 (6 Cir. 1976), cert. den. 96 S.Ct. 2629. The holding of the recent case of United States v. Neary, ___F.2d ___ (decided March 31, 1977, 7 Cir.) permits a challenge to the discretion of the sentencing judge on the issue of the finding as to

"dangerous." Certainly in this case there was insufficient evidence for this finding, and the court abused its discretion in making it.

2) One of the convictions considered in the sentencing has since been set aside on collateral attack (A-429). Under 18 U.S.C. §3575,

> "A conviction shown on direct or collateral review . . . to be invalid shall be disregarded for purposes of paragraph (1)."

3) The government requested that the court consider a recommendation contained in the probation report, never offered in evidence and hence not before this Court, which stated as to defendant's character that the "prognosis" for his future conduct "is poor" (716, A-371). Despite objection on the part of defendant's attorney that this was hearsay and should not be considered, the court stated that it would consider it and did so in its sentence (717, A-372).

4) The fact that the conviction for conspiracy violation of the counterfeit law overlapped the events of the instant conviction meant, in effect, that Heimerle was suffering double punishment for the same acts, contrary to the double jeopardy provisions of the United States Constitution.

Said the United States Supreme Court in the recent case of Jeffers v. United States, ___ U.S. ___ (decided June 16, 1977):

> "If some possibility exists that the two statutory offenses are the 'same offense' for double jeopardy purposes, however, it is necessary to examine the problem closely in order to avoid

constitutional multiple punishment difficulties. See North Carolina v. Pearce, 395 U.S. at 717; United States v. Wilson, 420 U.S. 332, 343 (1975)."

It is here submitted that the facts overlap with regard to the indictment in the instant case and in the case before Judge Metzner (76 Cr. 146, 76-1296-97). In the case at bar the conspiracy was alleged to have occurred between November, 1975 and February 29, 1976. In the Metzner case the conspiracy occurred between January 28, 1976 and February 6, 1976. (Metzner transcript, 76-1296-97, pp. 6, 7). The counterfeit bills in the Metzner case were hundred dollar bills and yellow. The same agents, George P. Hemmer, Jr. and Samuel Zoma, were investigating agents in both cases (426-438, 513-523) (Metzner transcript 77 et seq. and 126-127). A person by the name of "fat Tony" appeared to be a co-conspirator in both counterfeit cases (381, Metzner transcript, p. 196).

In the Metzner case Heimerle is alleged to have been the source of the counterfeit money and in the case at bar there was evidence that a printing press for counterfeit money was operated by Heimerle during the same time period (348).

5) The notice filed by the government was filed on the eve of trial thus not affording the defendant a reasonable time before trial. Vigorous objection was taken to this late filing of the government's intention to proceed against Heimerle as a dangerous special offender (702).

One of the requirements of the statute is that

> "Notice to the defendant of the Government's intention to seek an 'increased sentence' [be given] a reasonable time before trial of the crime." United States v. Stewart, 531 F.2d 326 (6 Cir. 1976), cert. den. 96 S.Ct. 2629.

The leading cases concerning the application of the dangerous special offender statute, all of which discuss the constitutional hazards posed by the process of making such a finding are United States v. Kelly, 519 F.2d 251 (8 Cir. 1975); United States v. Duardi, 384 F.S. 861 (S.D. Mo. 1973) aff'd. 529 F.2d 123 (8 Cir. 1975); and United States v. Stewart, supra. See Specht v. Patterson, 386 U.S. 605 (1967); Mullaney v. Wilbur, 421 U.S. 684 (1975); "The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals," 89 H.L.R. 356 (1975).

Based on the foregoing, at the very least the defendant Heimerle should be returned to the District Court for resentencing to no more than the statutory maximum of five years on the conspiracy count. That sentence, moreover, must run concurrently with the Metzner sentence to avoid double punishment.[5]

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5. Judge Metzner found against the government and in favor of Heimerle on a prior charge that he was a dangerous special offender. Judge Metzner had the same record before him concerning Heimerle, but his finding was contrary to that of Judge Pollack. The government has since withdrawn its appeal in the Metzner case from the court's ruling on this issue. See 76-1296-97.

POINT V

DEFENDANT HEIMERLE JOINS IN ANY POINT MADE BY CO-DEFENDANT WARME APPLICABLE TO HIS CASE BUT NOT SET FORTH HERE.

CONCLUSION

The judgment of the court below as to the defendant Heimerle should be reversed.

Dated: New York, New York
August 15, 1977

Respectfully submitted,

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2 Copies Received
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Hon. Robert B. Fiske, Jr.